United Plumbing and Sanitation Sdn Bhd v Taman Ratu Sdn Bhd and another application

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO PA-22NCVC-8–01 OF 2022 AND PA-22NCVC-9–01 OF 2022
ANAND PONNUDURAI J
4 JUNE 2024

Contract — Agreement — Sale and purchase agreements ('SPAs') — Defendant's failure to deliver vacant possession of property to plaintiffs due to landslide — Plaintiffs claimed specific performance of SPAs or alternatively damages in lieu of specific performance — Whether defendant abandoned project — Whether plaintiffs entitled to specific performance of SPAs or damages in lieu of specific performance of SPAs — Whether plaintiffs entitled to declaration that they were entitled to LAD

These two claims were by two separate individual purchasers who purchased houses from the same developer defendant via different sale and purchase agreements ('SPAs') executed on different dates. Pursuant to the SPAs, the plaintiffs were supposed to receive vacant possession in 2014 and 2016 respectively, but the defendant had failed to do so as per the agreements. The plaintiffs' claims were essentially for specific performance of the SPAs or alternatively damages in lieu of specific performance. The plaintiffs had also sought a declaration that they were entitled to liquidated ascertained damages ('LAD') and consequently sought various sums and also sought general damages. However, the plaintiffs had subsequently withdrawn their prayers for LAD and general damages. The defendant contended that they had completed the construction of the development by 5 April 2017. However, the certificate of completion and compliance ('CCC') for the development had not been issued at the material time. It was the defendant's case that they were in the course of applying for CCC for the development when a landslide induced by exceptionally heavy rain occurred on 5 November 2017. The landslide destroyed the earth retaining wall structure and caused damage to the properties in the development. Due to the destruction brought by the landslide, the defendant contended that they were prevented from obtaining the CCC for the development and delivering vacant possession of the properties to the plaintiffs. It was the defendant's defence that they did not abandon the development after the landslide, had taken active steps to obtain the local authority's approval to reconstruct damaged infrastructure and repair damaged houses and had proceeded with mitigation works. The issues for determination were: (a) whether the defendant abandoned the project; (b) whether the plaintiffs were entitled to specific performance of the SPAs or damages in lieu of specific performance of the SPAs; and (c) whether the

plaintiffs were entitled to a declaration that they were entitled to LAD. A similar case was decided earlier in a claim brought by a different plaintiff against the same defendant in Suit 161. The High Court found that it was not a case of the defendant refusing to perform the contract but were prevented to do so by the landslide and mitigation works underway and concluded that an order for specific performance would contravene the law but proceeded to order damages in lieu of specific performance. The Court of Appeal had allowed the defendant's appeal and set aside the entire decision of the High Court in Suit 161.

Held, dismissing the plaintiffs' claim:

(1) The defendants could not be accused of abandoning the project. On the contrary, the defendant did not abandon the project after the occurrence of the landslide but had indeed taken all necessary steps to carry on the mitigation works to complete the project and to abide by the obligations under the SPAs and to endeavour to deliver vacant possession to the plaintiffs in due course. Further, there was no certificate issued nor publication of *Gazette* by the Minister of Housing and Local Government which certified that the licensed housing developer had abandoned the housing development pursuant to s 11(ca) of the Housing Development (Control and Licensing) Act 1966. As such, it could not be said that the defendant had abandoned the project or would be unable to deliver vacant possession of the properties to the plaintiffs. All reasonable actions and precautions had been taken to mitigate and solve the issues caused by the landslide. There was no basis for the plaintiffs' claim for specific performance of the SPAs (see paras 75–78).

(2) Since the Court of Appeal had allowed the defendant's appeal in Suit 161 and had clearly held that the plaintiff was not entitled to damages in lieu of specific performance since they had no legal right to specific performance in the first place, the court was constrained by the doctrine of stare decisis to follow the decision of the Court of Appeal and to similarly dismiss the plaintiffs' claim herein for specific performance as well as the alternative remedy of damages in lieu of specific performance. In light of the dismissal of the leave application to appeal to the Federal Court which included the determination of specific performance as well as the alternative award of damages in lieu of specific performance, the plaintiffs' claim for specific performance and its alternative remedy of damages in lieu of specific performance was unsustainable and unmeritorious. The contention that the SPAs were capable of specific performance at the discretion of the court pursuant to s 18(5) of the Specific Reliefs Act 1950 and that specific performance could be granted subject to conditions without violating any applicable statutory provisions was bereft of merits in light of the decision of the appellate courts (see paras 85, 88 & 89).

(3) Based on the express words in cl 22(3) of the SPAs, it was clear that the plaintiffs' entitlement to liquidated damages did not accrue until the date of the delivery of vacant possession of the properties which had yet to be given. The plaintiffs' claim for LAD was premature and only accrued once vacant possession was given. There was no necessity to make any declaration relating to LAD (see paras 91 & 93).

[Bahasa Malaysia summary

Kedua-dua tuntutan ini dibuat oleh dua pembeli individu berasingan yang membeli rumah daripada defendan pemaju yang sama melalui perjanjian jual beli ('SPA') yang ditandatangani pada tarikh yang berbeza. Berdasarkan SPA tersebut, plaintif sepatutnya menerima milikan kosong masing-masing pada tahun 2014 dan 2016, tetapi defendan gagal melakukannya seperti yang dipersetujui. Tuntutan plaintif pada asasnya adalah untuk pelaksanaan spesifik SPA atau sebagai alternatif, ganti rugi sebagai pengganti pelaksanaan spesifik. Plaintif juga memohon perisytiharan bahawa mereka berhak kepada ganti rugi dipastikan ('LAD') dan seterusnya menuntut pelbagai jumlah serta ganti rugi am. Namun, plaintif kemudiannya telah menarik balik permohonan mereka untuk LAD dan ganti rugi am. Defendan berhujah bahawa mereka telah menyiapkan pembinaan pembangunan tersebut pada 5 April 2017. Walau bagaimanapun, sijil penyiapan dan pematuhan ('CCC') untuk pembangunan itu belum dikeluarkan pada masa yang material. Pihak defendan menyatakan bahawa mereka sedang dalam proses memohon CCC untuk pembangunan tersebut apabila berlaku tanah runtuh akibat hujan lebat luar biasa pada 5 November 2017. Tanah runtuh tersebut telah memusnahkan struktur tembok penahan tanah dan menyebabkan kerosakan pada hartanah dalam pembangunan tersebut. Disebabkan kemusnahan yang dibawa oleh tanah runtuh itu, defendan berhujah bahawa mereka terhalang daripada mendapatkan CCC untuk pembangunan tersebut dan menyerahkan milikan kosong hartanah kepada plaintif. Pembelaan defendan adalah bahawa mereka tidak meninggalkan pembangunan selepas kejadian tanah runtuh, malah telah mengambil langkah aktif untuk mendapatkan kelulusan pihak berkuasa tempatan bagi membina semula infrastruktur yang rosak dan membaiki rumah yang terjejas serta melaksanakan kerja-kerja mitigasi. Isu-isu untuk penentuan adalah: (a) sama ada defendan telah meninggalkan projek tersebut; (b) sama ada plaintif berhak kepada pelaksanaan spesifik SPA atau ganti rugi sebagai pengganti pelaksanaan spesifik SPA; dan (c) sama ada plaintif berhak kepada perisytiharan bahawa mereka berhak kepada LAD. Kes serupa telah diputuskan sebelum ini dalam tuntutan yang dibawa oleh plaintif lain terhadap defendan yang sama dalam Saman 161. Mahkamah Tinggi mendapati bahawa kes tersebut bukanlah kes di mana defendan enggan melaksanakan kontrak tetapi terhalang daripada melaksanakannya akibat tanah runtuh dan kerja mitigasi yang sedang dijalankan. Mahkamah Tinggi memutuskan bahawa perintah pelaksanaan spesifik akan melanggar undang-undang tetapi memerintahkan ganti rugi sebagai pengganti

pelaksanaan spesifik. Mahkamah Rayuan telah membenarkan rayuan defendan dan membatalkan keseluruhan keputusan Mahkamah Tinggi dalam Saman 161.

Diputuskan, menolak tuntutan plaintif-plaintif:

(1) Defendan tidak boleh dituduh meninggalkan projek tersebut. Sebaliknya, defendan tidak meninggalkan projek selepas berlakunya tanah runtuh tetapi telah mengambil semua langkah yang perlu untuk meneruskan kerja-kerja mitigasi bagi menyiapkan projek tersebut, mematuhi kewajipan di bawah SPA, dan berusaha menyerahkan milikan kosong kepada plaintif pada masa yang sewajarnya. Tambahan pula, tiada sijil yang dikeluarkan atau Warta diterbitkan oleh Menteri Perumahan dan Kerajaan Tempatan yang mengesahkan bahawa pemaju perumahan berlesen telah meninggalkan pembangunan perumahan tersebut menurut s 11(ca) Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966. Oleh itu, tidak boleh dikatakan bahawa defendan telah meninggalkan projek tersebut atau tidak dapat menyerahkan milikan kosong hartanah kepada plaintif. Semua tindakan yang munasabah dan langkah berjaga-jaga telah diambil untuk mengurangkan dan menyelesaikan isu-isu yang disebabkan oleh tanah runtuh. Tiada asas untuk tuntutan plaintif terhadap pelaksanaan spesifik SPA (lihat perenggan 75-78).

(2) Memandangkan Mahkamah Rayuan telah membenarkan rayuan defendan dalam Saman 161 dan dengan jelas memutuskan bahawa plaintif tidak berhak kepada ganti rugi sebagai pengganti pelaksanaan spesifik kerana mereka tidak mempunyai hak undang-undang untuk pelaksanaan spesifik pada mulanya, mahkamah terikat dengan doktrin stare decisis untuk mengikuti keputusan Mahkamah Rayuan dan dengan itu menolak tuntutan plaintif untuk pelaksanaan spesifik serta remedi alternatif ganti rugi sebagai pengganti pelaksanaan spesifik. Berikutan penolakan permohonan kebenaran untuk merayu kepada Mahkamah Persekutuan, termasuk penentuan pelaksanaan spesifik dan ganti rugi alternatif sebagai pengganti pelaksanaan spesifik, tuntutan plaintif untuk pelaksanaan spesifik dan remedi alternatifnya tidak boleh diterima dan tidak mempunyai merit. Hujahan bahawa SPA boleh dilaksanakan secara spesifik mengikut budi bicara mahkamah berdasarkan s 18(5) Akta Relief Spesifik 1950 dan bahawa pelaksanaan spesifik boleh diberikan tertakluk kepada syarat tanpa melanggar mana-mana peruntukan statutori yang terpakai tidak mempunyai merit dalam mengambil kira keputusan mahkamah rayuan (lihat perenggan 85, 88 & 89).

(3) Berdasarkan kata-kata jelas dalam klausa 22(3) SPA, adalah jelas bahawa hak plaintif untuk ganti rugi tertunggak hanya timbul pada tarikh serahan milikan kosong hartanah yang masih belum diberikan. Tuntutan

plaintif untuk LAD adalah pramatang dan hanya akan timbul selepas milikan kosong diberikan. Tiada keperluan untuk membuat sebarang perisytiharan berkaitan LAD (lihat perenggan 91 & 93).]

Cases referred to

Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd [2014] 5 MLJ 491; [2014] 7 CLJ 461, CA (refd)
Bosaid v Andry [1963] VR 465 (refd)
Kwan Sun Ming v Chak Chee Hing [1965] 1 MLJ 236, FC (refd)
Lavery v Pursell (1888) 39 Ch D 508, Ch D (refd)
Million Westlink Sdn Bhd & Anor v Maybank Investment Bank Bhd & Ors and others appeals [2018] 4 MLJ 392; [2018] 3 CLJ 315, CA (refd)
Pasumarti Ramulu v Nuthi Anantha Ramulu AIR 1966 AP 70 (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 s 11(ca)
Housing Development (Control and Licensing) Regulation 1989 reg 11(1), Schedule G
Rules of Court 2012 O 33
Specific Relief Act 1950 s 18 , 18(5)
Town and Country Planning Act 1976 s 19

Malkit Singh (Malkit Singh Randhawa Baidura & Co) for the plaintiff.
Lim Hock Siang (with Daniel Khoo Kelvin) (Presgrave & Matthews) for the defendant.

Anand Ponnudurai J:

INTRODUCTION

[1] These two claims are by two separate individual purchasers who purchased houses from the same developer defendant via different sale and purchase agreements ('SPAs') executed on different dates.

[2] As the plaintiffs were represented by the same set of solicitors and the defendants are the same and represented by the same set of solicitors, Suit No PA-22NCVC-9–01 of 2022 ('Suit No 9') was transferred to be heard together with Suit No PA-22NCVC-8–01 of 2022 ('Suit No 8'). There is no dispute that pursuant to the SPAs, the plaintiffs were supposed to receive vacant possession in 2014 and 2016 respectively but the defendant had failed to do so as per the agreements. However, the main defence of the defendant is that a landslide had occurred on 5 November 2017 and this has prevented them from delivering the said properties to the plaintiffs to date.

[3] The plaintiffs' claims are essentially for specific performance of the SPAs or alternatively damages in lieu of specific performance. The plaintiffs have also sought a declaration that they are entitled to liquidated ascertained damages ('LAD') and consequently sought various sums as per their calculations and also sought general damages.

[4] However, the plaintiffs have subsequently withdrawn their prayers for LAD and general damages. In fact, the plaintiffs have at para 12 of their written submissions agreed that the main issue in this case is whether or not the plaintiffs are entitled to specific performance of the SPAs or alternatively damages in lieu of specific performance.

[5] This decision to some extent has been delayed by proceedings in a similar case which was decided earlier in a claim brought by a different plaintiff against the same defendant herein namely *Albert Lim Kok Heng & Anor v Taman Ratu Sdn Bhd* in Suit No PA-22NCVC-161–07 of 2019 ('Suit No 161').

[6] In that case, there was no trial but a decision rendered by Goerge Varughese JC on 28 October 2021 pursuant to O 33 of the Rules of Court 2012. In that case, upon considering the facts which were almost identical to the ones at hand and also relate to the same terms and conditions under Schedule G of sub-reg 11(1) of the Housing Development (Control and Licensing) Regulation 1989 and considering the case law and the applicability of s 18 of the Specific Relief Act 1950, His Lordship essentially made the following observations and findings in that case:

(a) the obligations of the defendant in the SPAs to deliver vacant possession within 24 months was clear;

(b) at para 37, he found that it was not a case of the defendant refusing to perform the contract but were prevented to do so by the landslide and mitigation works underway;

(c) at paras 38 and 39, he then concludes that an order for specific performance would contravene the law; and

(d) he however proceeds to order damages in lieu of specific performance.

[7] There is no disputing that the plaintiffs herein commenced these proceedings in 2022 placing heavy reliance on the above decision of *Albert Lim* n Suit No 161 with the same set of counsel here.

[8] The defendant maintained their defence and was of the view that the decision of George Varughese JC was erroneous and which was pending appeal. Notwithstanding such appeal, a trial was conducted in January 2023 for both Suits with each party calling two witnesses.

[9] During trial, the professional engineer, Mr Srinivasan testified as SD2 whereby it was clear that the defendant have proceeded with mitigation works which encompass four stages with the first and second stages being completed and having applied for stages 3 and 4 in October 2023, they were still waiting for approval.

[10] Upon conclusion of trial, I allowed a further document to be added with the consent of the parties which revealed that the MBPP have approved the commencement of the earth works for stages 3 and 4.

[11] As such, whilst we have yet to ascertain when exactly vacant possession can and will be handed to the plaintiffs, it is clear that the work for both stages 3 and 4 of mitigation works are currently underway.

[12] However, upon initial written submissions having been filed, it transpired that the Court of Appeal had on 2 October 2023 allowed the defendant's appeal and set aside the entire decision of the High Court in Suit No 161.

[13] It is pertinent to set out the unanimous decision of the Court of Appeal which reads as follows:

> Keputusan:
>
> Court:
>
> *Unanimous decision.*
>
> 2. The main issue is *whether the [Plaintiffs] are entitled to Specific Performance (SP), or alternatively damages in lieu of specific performance of the Sale and Purchase Agreement (SPA).*
>
> 3. *The learned Judicial Commissioner has made a finding in para 38 Grounds that an order for specific performance of the SPA will be tantamount to compelling the [Defendant] to carry out stages 3 & 4 of the mitigation works in breach of section 19, Town & Country Planning Act 1976.*
>
> 4. *In para (39), the learned JC then made a finding that it is trite law that the courts will not order specific performance of a contract if the performance of which would contravene an express provision of the law or an illegality.*
>
> 5. Therefore, we are of the considered opinion that since the learned JC has held *SP cannot be ordered since the performance of which would contravene the law, we agree with the [Defendant] that the [plaintiffs] are therefore not entitled to damages in lieu of specific performance since the [plaintiffs] have no legal right to the specific performance*.
>
> 6. This is also not a claim for damages for breach of contract but damages in lieu of SP.
>
> 7. *We therefore find that the learned Judge has erred in law that requires appellate*

intervention. The appeal is allowed and the decision of the JC set aside.

[14] From the above, it is clear that the decision of the Court of Appeal would in essence defeat the plaintiffs' claim herein as on the very same facts, this court cannot order specific performance and as such could/should not award damages in lieu of specific performance.

[15] Whilst the defendant then urged this court to determine the dispute based purely on the above decision of the Court of Appeal, I decided not to do so but to await the outcome of the plaintiff's (Albert Lim's) leave application to appeal to the Federal Court. However, leave was not granted on 19 February 2024 and as such, I allowed parties one final submission before deciding on this case.

[16] With the above background, I will delve a bit more into the facts of this case and my analysis/decision.

BACKGROUND FACTS

[17] The defendant in their written submission has helpfully provided the factual background facts in respect of both cases which can be summarised as follows.

The SPA in Suit No 8

[18] The parties executed a SPA on 22 December 2014 in respect of Plot 17 which is based on Schedule G sub-reg 11 (1) of the Housing Development (Control and Licensing) Regulations 1989 ('Plot 17 SPA').

[19] The purchase price was RM1,975,000 (after rebate of RM5,000). The purchase price is to be paid in instalments based on the stages and amounts as set out in the Third Schedule of Plot 17 SPA.

[20] The architect has certified the stages of completion as stated in paras 1 and 2(a) to (h) of the Third Schedule of Plot 17 SPA pursuant to the following certificates:

No.	Stage of Completion	Date of Architect Certificates
a.	2(a)	15 March 2016
b.	2(b)	19 August 2016
c.	2(c)	24 October 2016
d.	2(d)	
e.	2(e)	6 March 2017

f.	2(f)	24 June 2016
g.	2(g)	18 October 2016
h.	2(h)	5 April 2017

[21] The defendant has invoiced the plaintiff for the amounts payable as stated in paras 1 and 2 (a) to (h) of the Third Schedule of the SPA totalling RM1,584,000 as follows:

No.	Stage of Completion	Date of Notice of Completion
a.	2(a)	17 March 2016
b.	2(b)	22 August 2016
c.	2(c)	25 October 2016
d.	2(d)	
e.	2(e)	20 February 2017
f.	2(f)	24 June 2016
g.	2(g)	18 October 2016
h.	2(h)	5 April 2017

[22] The plaintiff has paid the defendant a total sum of RM1,475,325.94.

[23] There is thus an outstanding sum of RM108,674.06 due and owing by the plaintiff to the defendant which comprised of the following:

(a) the balance sum of RM9,674.06 out of total sum of RM99,000 invoiced to the plaintiff pursuant to architect certificate dated 5 April 2017 in respect of para 2(g) of the Third Schedule of the SPA; and

(b) the sum of RM99,000 invoiced to the plaintiff pursuant to architect certificate dated 5 April 2017 in respect of para 2(h) of the Third Schedule of the SPA.

The SPA in Suit No 9

[24] The parties executed SPA on 4 June 2012 in respect of Plot 18 based on Schedule G sub-reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ('Plot 18 SPA').

[25] The purchase price is RM1,980,000 (after discount of RM200,000). The purchase price is to be paid by instalments based on the stages and amounts as set out in the Third Schedule of Plot 18 SPA.

[26] The architect has certified the stages of completion as stated in paras 1 and 2(a) to (h) of the Third Schedule of the SPA pursuant to the following certificates:

No.	Stage of Completion	Date of Architect Certificates
a.	2(a)	15 March 2016
b.	2(b)	19 August 2016
c.	2(c)	24 October 2016
d.	2(d)	
e.	2(e)	20 February 2017
f.	2(f)	24 June 2016
g.	2(g)	18 October 2016
h.	2(h)	5 April 2017

[27] The defendant has invoiced the plaintiff for the amounts payable as stated in paras 1 and 2 (a) to (h) of the Third Schedule of Plot 18 SPA totalling RM1,544,000 and the plaintiff has paid the aforesaid sum to the defendant, (hereinafter collectively referred to as 'SPAs').

COMPLETION OF THE DEVELOPMENT

[28] The defendant contends that they had completed the construction of the development by 5 April 2017. However, the Certificate of Completion and Compliance ('CCC') for the said development had not been issued at the material time.

THE DESTRUCTION CAUSED BY THE LANDSLIDE ON 5 NOVEMBER 2017

[29] On 5 November 2017, there was a landslide at the site after exceptionally heavy rain.

[30] It is the defendant's case that they were in the course of applying for CCC for the Development when a landslide induced by exceptionally heavy rain occurred on 5 November 2017.

[31] The landslide destroyed the earth retaining wall structure, the road known as 'Persiaran Tanjung Bungah 3' which was built on top of the earth retaining wall structure and the drainage system which have been completed by the defendant.

[32] The landslide had also caused damage to the properties in the said development (which are Lot 1296 (Plot 17) and Lot 1297 (Plot 18) respectively and four other houses which had been completed at the material time on 5 November 2017. The other four houses include Lot 1294 (Plot 15), Lot 1295 (Plot 16), Lot 1298 (Plot 19) and Lot 1299 (Plot 20), Mukim 17, Daerah Timur Laut, Pulau Pinang.

[33] The damage caused to the said properties due to the landslide can be seen in the photographs at pages 75–78 of Bundle B.

[34] The aforesaid landslide was also reported in *The Star* newspaper report dated 7 November 2017 titled 'Devastation attracting attention'.

[35] The aforesaid landslide was allegedly caused by a rare weather phenomenon known as a cyclone which eventually resulted in 'the worst flood on the island in 30 years' as reported in *The Star* Newspaper Article dated 8 November 2017 entitled 'Time for a cyclone warning system'.

[36] Due to the destruction brought by the landslide, the defendant contends that they were prevented from obtaining the CCC for the said development and delivering vacant possession of the properties to the plaintiffs.

AMENDMENT OF ORIGINAL LAYOUT PLAN/PLANNING PERMISSION REQUIRED BY LOCAL AUTHORITIES FOR MITIGATION WORKS

[37] It is the defendant's defence that they did not abandon the said development after the landslide. The defendant took steps to apply to the local authority, Majlis Bandaraya Pulau Pinang ('MBPP') for approval to reconstruct the damaged infrastructure and repair the damaged houses.

[38] The defendant had through its consulting engineer, Messrs Sri & Sri's Associates Sdn Bhd ('Sri & Sri') submitted a mitigation works plan to MBPP.

[39] The mitigation works plan involved the repair and reconstruction of the damage caused by the aforesaid landslide in four stages as follows:

STAGES	DETAILS
1	Involves the preparation of ground/ site and rockfill to Finish Ground Level of 44.5 at an area as indicated in orange in the Layout for Mitigation Work plan.
2	Involves the stabilisation of slope with soil nailing and construction of retaining wall with micropile in front of Plot 15 - Plot 20 of the semi-detached houses.
3	Involves the stabilisation of ground below the elevated driveway to be constructed at the area outside the site boundary of the said Project. An elevated driveway will be built to replace the retaining wall and road which had collapsed.

4	Involves the making good of existing 1,800mm concrete drain.

[40] Pursuant to MBPP's letter dated 24 September 2018, MBPP had approved the mitigation works plan based on the conditions as contained therein.

[41] One of the conditions imposed by MBPP as contained in para 5(iv) of MBPP letter dated 24 September 2018 is that the defendant is required to obtain approval as referred thereto under s 19 of the Town and Country Planning Act 1976 to execute stages 3 and 4 of the mitigation works plan ('the mitigation planning permission').

[42] Paragraph 5(iv) of MBPP's letter dated 24 September 2018 states as follows:

> Untuk peringkat selanjutnya, *kelulusan pelan Kebenaran Merancang hendaklah diperolehi terlebih dahulu* termasuk kelulusan Laporan Geoteknikal oleh Jawatankuasa Pembangunan Tanah Berisiko Negeri Pulau Pinang sebelum sebarang kerja boleh dibenarkan untuk diteruskan.

[43] It is clear that the defendant is not permitted to commence stages 3 and 4 of the mitigation works until the mitigation works planning permission has been approved as stages 3 and 4 of the mitigation works plan involved variation to the original layout plan/planning permission of the development granted by MBPP.

[44] Stages 1 and 2 of the mitigation works plan which were not subjected to the condition imposed under para 5(iv) of the MBPP's letter dated 24 September 2018 have been completed.

[45] Since the defendant has transferred the ownership of 'Persiaran Tanjung Bungah 3' to the state authority, the application for mitigation works planning permission requires the consent and signature of the Pejabat Tanah dan Galian ('PTG').

[46] Pursuant to PTG's letter dated 19 August 2020, PTG has consented to the application for mitigation works planning permission subject to conditions as imposed therein.

[47] The defendant's consulting engineer, Sri & Sri, forwarded the application for mitigation works planning permission to PTG for signature on 22 February 2021.

[48] On 3 May 2021, the defendant's consulting engineer, Sri & Sri submitted the application for mitigation works planning permission that was duly executed by PTG to Unit Urusetia Pusat Setempat ('OSC') of MBPP for approval.

[49] MBPP, however, required the application for mitigation works planning permission to be executed by the purchasers of Lot 1295 (Plot 16), Lot 1298 (Plot 19) and Lot 1299 (Plot 20) as well since the defendant had transferred the ownership of the same to the purchasers.

[50] On 6 August 2021, the defendant had vide its consulting engineer, Sri & Sri requested the purchasers of Lot 1298 (Plot 19) to sign the application for mitigation works planning permission. The purchasers of Lot 1298 (Plot 19) however refused to sign the application for mitigation works planning permission.

[51] MBPP subsequently decided to exclude Lot 1298 (Plot 19) from the application for mitigation works planning permission. On 19 November 2021, the defendant had vide its consulting engineer, Sri & Sri submitted the application for mitigation works planning permission which excluded Lot 1298 (Plot 19) and duly executed by the owners of Lot 1295 (Plot 16), Lot 1299 (Plot 20), PTG and the defendant for approval by OSC of MBPP.

[52] Pursuant to MBPP's letter dated 18 October 2022, the mitigation works planning permission was approved.

[53] Further, MBPP has recently vide its letter dated 1 March 2023 approved the commencement of earth works in connection with stages 3 and 4 of the mitigation works plan.

[54] The defendant intends to deliver vacant possession of the said properties to the plaintiffs once the defendant has completed stages 3 and 4 of the mitigation works and obtained the CCC for the said development.

TRIAL

[55] The trial was conducted over three days with the following witnesses testifying:

(a) the plaintiff's witnesses:

(i) Lau York Yip (SP1) in her capacity as the Director of the plaintiff in Suit No 8;

(ii) Law Bee Bee (SP2) in her capacity as one of the purchasers in Suit

No 9 and a Director in a company called Optimus Excel Sdn Bhd.

(b) the defendant's witnesses:

(i) Tan Poh Poh (SD1) in her capacity as the Administrative Executive of the defendant; and

(ii) Srinivasan a/l Muthu Palaniappa (SD2) in his capacity as a professional Engineer and the Managing Director of Sri & Sri Associates Sdn Bhd.

THE AGREED FACTS

[56] In Suit No 8, the parties agreed to the following facts:

(a) that the parties have entered into a Sale and Purchase Agreement dated 22 December 2014 ('SPA') in respect of Plot 17 which is a 3 storey semidetached house held under Geran No Hakmilik 112323, Lot 1296, Mukim 17, Daerah Timur Laut, Negeri Pulau Pinang ('the said property') agreed to be sold and erected by the defendant in the time and manner therein stated;

(b) that the SPA is based on Schedule G of sub-reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989;

(c) that the purchase price of the said property is RM1,975,000 (after a rebate of RM5,000 for the omission of Jacuzzi). The purchase price is to be paid in accordance with the stages and amounts as described in paras 2(a) to (h) of the Third Schedule of the SPA;

(d) that as at the date of the Writ, the defendant has invoiced the plaintiffs for the amounts payable as stated in paras 1 and 2(a) to (h) of the Third Schedule of the SPA totalling RM1,584,000;

(e) that the plaintiffs have paid the defendant a total sum of RM1,475,325.94 as at the date of this writ; and

(f) that on 9 June 2020, the plaintiffs vide their solicitors, Messrs Malkit Singh Randhawa Baidura & Co issued a written notice to notify the defendant about its failure to deliver vacant possession of the said property within the time and manner stipulated in the SPA together with a claim for liquidated damages amounting to RM684.486.30 (calculated from 22 December 2016 to 8 June 2020 ie for 1265 days and continuing). On 22 June 2020, the defendant through their solicitors, Messrs Presgrave & Matthews replied to the aforesaid letter disputing the plaintiff's claim herein.

[57] In Suit No 9, the parties agreed to the following facts:

(a) that the parties have entered into a sale and purchase agreement dated 4 June 2012 ('SPA') in respect of Plot 18, a three storey semi-detached house held under Geran No Hakmilik 112323, Lot 1297, Mukim 17, Daerah Timur Laut, Negeri Pulau Pinang ('the said property') agreed to be sold and erected by the defendant in the time and manner therein stated;

(b) that the SPA is based on Schedule G of sub-reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989;

(c) that the purchase price of the said property is RM1,980,000 (after a discount of RM200,000). The purchase price is to be paid in accordance with the stages and amounts as described in paras 2(a) to (h) of the Third Schedule of the SPA;

(d) that as at the date of the Writ, the defendant has invoiced the plaintiffs for the amounts payable as stated in paras 1 and 2(a) to (h) of the Third Schedule of the SPA totalling RM1,544,000;

(e) that the plaintiffs have paid the defendant a total sum of RM1,544,000 as at the date of this writ; and

(f) that on 6 July 2020, the plaintiffs via their solicitors, Messrs Malkit Singh Randhawa Baidura & Co issued a written notice to notify the defendant about its failure to deliver vacant possession of the said property within the time and manner stipulated in the SPA together with a claim for liquidated damages amounting to RM941,205.47 (calculated from 4 June 2014 to 6 July 2020 ie for 2214 days and continuing). On 14 July 2020, the defendant through their solicitors, Messrs Presgrave & Matthews replied to the aforesaid letter disputing the plaintiff's claim herein.

THE ISSUES TO BE TRIED

[58] The issues to be tried as agreed by parties are as follows:

(a) whether the plaintiffs are entitled to specific performance of the SPAs?

(b) alternatively damages in lieu of specific performance of the SPAs?

(c) further and/or in the alternative a declaration that the plaintiff is entitled to liquidated damages and to set off the amount due to the defendant (if any) from liquidated damages due from the defendant to the plaintiffs?

(d) whether the landslide which occurred on 5 November 2017 constitutes a force majeure and a defence which is available to the defendants?

(e) whether the plaintiff's claim for specific performance of the SPA is tantamount to compelling the defendant to contravene the conditions as contained in MBPP's letter dated 24 September 2018 and s 19 of the

A Town and Country Planning Act 1976?

THE PARTIES' SUBMISSIONS/CONTENTIONS

The plaintiffs' submissions/contentions

B **[59]** The plaintiffs' submissions/contentions as seen in their written submissions can be summarised as follows:

(a) that the defendant had failed to deliver the vacant possession to the plaintiffs within the prescribed period of 24 months pursuant to cl 22(1) of the SPAs;

C

(b) that the defendant is liable for the accrued liquidated damages pursuant to cl 22(2) of the SPAs;

(c) that the defendant had failed to deliver the vacant possession of the properties despite cl 8 of the SPAs provides that 'time shall be the essence of the contract in relation to all provisions of this Agreement';

D

(d) that the defendant was in fundamental breach of the SPAs and the plaintiffs have suffered loss and damage;

E

(e) that the defendant was already in breach of the SPAs prior to the occurrence of the landslide on 5 November 2017 thus the landslide does not constitute a force majeure and such occurrence of the landslide is not relevant to the plaintiffs' claim herein;

F

(f) that the defendant's was lackadaisical in carrying out the mitigation works;

(g) that the plaintiffs' action herein was against the defendant's failure to deliver the vacant possession and not against the change of the original layout plan. As a result, cl 12(4) of the SPAs is not applicable; and

G

(h) that the defendant is not entitle to rely on cl 22(3) of the SPAs as the defendant had failed to comply with cl 22(1) of the SPAs.

The defendant's submissions/contentions

H **[60]** The defendant's submissions/contentions can be summarised as follows:

(a) that the defendant has completed the development and was in the course of obtaining CCC for the development when the landslide occurred on 5 November 2017;

I

(b) that the defendant was prevented by the unforeseen natural disaster from obtaining CCC for the development and delivering vacant possession of the said property to the plaintiffs;

(c) that the landslide constitutes a force majeure or an act of God which is beyond the control of the defendant;

(d) that the defendant did not abandon the development and had taken active steps to obtained the local authority's approval to reconstruct damaged infrastructure and repair damaged houses;

(e) that pursuant to cl 12(4) of the SPAs, the plaintiffs are precluded from claiming any damages or compensation against the defendant; and

(f) that pursuant to cl 22 (3) of the SPAs, the plaintiffs' purported cause of action for liquidated damages has not arisen.

[61] Notwithstanding the issues above, as highlighted earlier, it can be discerned that the crux of this entire case was the issue of whether the plaintiffs are entitled to specific performance or damages in lieu of specific performance.

[62] The determination of this issue will in my view determine and substantially dispose this matter.

ISSUE NO 1: DID THE DEFENDANT ABANDONED THE PROJECT AND ARE THE THE PLAINTIFFS ENTITLED TO SPECIFIC PERFORMANCE OF THE SPAS OR DAMAGES IN LIEU THEREOF?

[63] It is the crux of the plaintiffs' case that the defendant has breached the terms of the SPAs in failing to give vacant possession to the plaintiffs in the manner stipulated under cl 23 of the SPAs and that the defendant is unable to provide a definite time period or date as to when the vacant possession can be given to the plaintiffs.

[64] The plaintiffs in their written submission rely on s 18 of the Specific Relief Act 1950 as well as decided cases such as *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491; [2014] 7 CLJ 461 and *Million Westlink Sdn Bhd & Anor v Maybank Investment Bank Bhd & Ors and others appeals* [2018] 4 MLJ 392; [2018] 3 CLJ 315 to support the contention that s 18 of the Specific Relief Act 1950 permits the dourt to order compensation for breach of contract in addition to or in substitution to the plaintiffs seeking specific performance.

[65] The plaintiffs also relies on the decision of George Varughese JC in the case of *Albert Lim Kok Heng & Anor v Taman Ratu Sdn Bhd* in Suit No PA-22NCVC-161–07 of 2019 (involving the same defendant and facts in this action) to support the contention that this court is not precluded from awarding damages in lieu of specific performance notwithstanding that the court is unable to order specific performance. However, the plaintiffs now cannot place any reliance on the decision of the High Court as the Court of

Appeal has since overturned the same and has held otherwise.

[66] The defendant on the other hand contends that it had completed the project on 5 April 2017 as the architect had certified that the defendant had completed the construction of the said properties including all the infrastructure works in relation to the said development as listed as stages 2(a)–(h) of the Third Schedule of the SPAs as confirmed by SP1 during cross-examination as follows:

> LHS: Now, can I refer you to ... Before I leave that, just a general question. So, would you agree with me that once the Architect certified the stage of completion 2(a) to 2(h), that basically means that your unit together with all the infrastructure work in relation to this development has been completed ?
>
> LAU: Yes.
>
> ...
>
> LHS: Miss Lau, do you accept that based on this certificate issued by the Architect dated 05.04.2017 certifying the completion from 2 (a) to 2 (h), that means the development has been physically completed as of 05.04.2017?
>
> LAU: Yes.
>
> (See p 10 of the notes of proceedings dated 11 January 2023)

[67] The defendant contends that it had yet to deliver vacant possession of the said properties to the plaintiffs as the application for CCC was still pending at the material time on 5 April 2017.

[68] The defendant further submits that the landslide which occurred on 5 November 2017 which is widely reported constitutes a force majeure or an act of God which is beyond the control of the defendant (see the Federal Court case of *Kwan Sun Ming v Chak Chee Hing* [1965] 1 MLJ 236).

[69] SD2 in his report dated 8 November 2017 explained that the infrastructure was destroyed by the excessive rainfall and landslide which occurred on that fateful day on 5 November 2017.

[70] Due to the said landslides, the defendant now has to construct an elevated driveway pursuant to stages 3 and 4 of the mitigation works plan to replace the earth retaining wall and road and drainage which were destroyed by the landslide without which, CCC cannot be obtained and vacant possession of the completed properties cannot be delivered to the plaintiffs.

[71] As such, the defendant contends that the only *part* of the SPAs that has yet to be performed by the defendant was the re-construction of the

infrastructure works under cl 16 of the SPAs, specifically stages 3 and 4 of the mitigation works plan which are necessary for the obtaining of the CCC.

[72] Further, I have noted that the defendant is not permitted to commence stages 3 and 4 of the mitigation works until the mitigation works planning permission has been approved as stages 3 and 4 of the mitigation works plan involved variation to the original layout plan/planning permission of the said development granted by MBPP as reflected at para 5(iv) of MBPP letter dated 24 September 2018.

[73] The fact that the defendant had to apply to MBPP to vary the planning permission because of the landslide is well within the knowledge of the plaintiffs as confirmed by SP1 during cross-examination as follows:

> YA: Not so much, forget the variation works. Are you aware, that there is a need to apply for variation of the planning permission first Forget about what the variation was. Are you aware that the defendant had to apply to the Majlis Bandaraya to vary the planning permission because of the landslides. Are you aware of that fact?
>
> LAU: Yes.
>
> (See p 18 of the notes of proceedings dated 11 January 2023)

[74] In this regard, as seen earlier, the defendant has since 1 March 2023 obtained the planning approval and approval for commencement of earth work from MBPP to carry out stages 3 and 4 of the mitigation works plan.

[75] From the above chronology of events, I certainly am unable to conclude that the defendants can be accused of abandoning the said project. On the contrary, in my view, the defendant did not abandon the said project after the occurrence of the landslide but has indeed taken all necessary steps to carry on the mitigation works to complete the project and to abide by the obligations under the SPAs and to endeavour to deliver vacant possession to the plaintiffs in due course. This too was the conclusion by George Varughese JC in the Albert Lim's case where he opined that it was not a situation of the defendant refusing to perform the contract but rather a case of being prevented from doing so.

[76] Further, as pointed out by learned counsel for the defendant, there is no certificate issued nor publication of *Gazette* by the Minister of Housing and Local Government which certifies that the licensed housing developer has abandoned the housing development pursuant to s 11(ca) of the Housing Development (Control and Licensing) Act 1966.

[77] As such, I am of the considered view that having taken into account the facts and circumstances of the case, it cannot be said that the defendant has

abandoned the said project or will be unable to deliver vacant possession of the said properties to the plaintiffs. All reasonable actions and precautions have been taken to mitigate and solve the issues caused by the landslide.

[78] Further, having taken into account the facts of the case, I find favour in the defendant's contention that there is no basis for the plaintiffs' claim for specific performance of the SPAs. In any event, as found by George Varughese JC and as confirmed by the Court of Appeal, it is trite law that the Court will not order specific performance where the performance of which will contravene the law as in this case.

[79] As such, I now move on to the next pivotal issue of whether or not the plaintiffs are then entitled to damages in lieu of specific performance.

Whether the plaintiffs are entitled to damages in lieu of specific performance of the SPA(s)?

[80] At the outset, if the Court of Appeal had upheld or affirmed the decision of George Varughese JC in Suit No 161, I would certainly be bound by the same and likewise would make an Order of damages in lieu of specific performance albeit in different amounts.

[81] However, the decision of the Court of Appeal certainly appears to support the defendant's contention that once it is determined that specific performance is not an available remedy, then damages in lieu thereof cannot be awarded. It therefore appears that it is a precondition for an order of damages in lieu of specific performance that specific performance is an available remedy in the first place. In other words, where specific performance is available, it is up to the court to decide whether or not it ought to grant specific performance or exercise its discretion to grant damages in lieu of specific performance. On the contrary, if specific performance is not available, then, damages cannot be awarded in lieu thereof.

[82] To support its contention, in addition to relying on the Court of Appeal decision in *Albert Lim*'s case, the defendant also relied on the case of *Lavery v Pursell* (1888) 39 Ch D 508 where Chitty J at p 519 of the report in dismissing the claim enunciated as follows:

> ... in this case when the writ was issued *it was impossible to give specific performance*. It was suggested that after Lord Cairns' Act the Court of Equity could give *damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance. It did not give the old Court of Chancery a general jurisdiction to give damages whenever it thought fit*, it was only in that kind of case where specific performance would have been the right decree and there were reasons why it would be better to substitute damages, *but that*

could not apply to a case where you could not have given specific performance.

...

In this case it is quite plain that the 11th January was the extreme day on which Mr Lavery, the purchaser, could have remained on the property for the purpose of pulling down and removing.

...

It would have been impossible to grant specific performance in this case, and that being so, it appears to me that the Plaintiff cannot recover any damages.

[83] Further, in the case of *Bosaid v Andry* [1963] VR 465, Scholl J from the Supreme Court of New Zealand at p 484 of the judgment enunciated as follows:

... It was clearly established that the plaintiff, i*n order to recover such damages from the Court of Chancery, must show that he had a right to specific performance at the hearing, or at least that he had such a right save for the existence of a ground entitling the court in its discretion to refuse the equitable remedy. He could not get damages under the Act if the evidence showed that he had no right at all to specific performance* ...

It is true that damages given under statutory power in substitution of specific performance cannot be given in a case where the grant of specific performance is impossible: *Lavery v Pursell* (1888) 39 Ch D 508 but the position is otherwise when the refusal of specific performance is based upon a discretionary ground, such as hardship.

[84] As such, based on the abovementioned case, the defendant submits that the plaintiffs' claim for specific performance or alternatively damages in substitution of specific performance under paras 11(1) and (2) of the statement of claim are unsustainable in law.

[85] In my view, having noted the above and especially that the Court of Appeal has allowed the defendant's appeal in *Albert Lim*'s case in Suit No 161 of which its facts are on all fours with the current and has clearly held that the plaintiff is not entitled to damages in lieu of specific performance since they have no legal right to specific performance in the first place, I am constrained by the doctrine of *stare decisis* to follow the said decision of the Court of Appeal and to similarly dismiss the plaintiffs' claim herein for specific performance as well as the alternative remedy of damages in lieu of specific performance.

[86] Further, it is to be noted that leave to appeal was filed before the Federal Court vide Civil Application No 08(f)-349–10 of 2023(P) against the Court of Appeal decision and learned counsel for the plaintiffs herein submitted there that the SPAs were capable of specific performance at the discretion of the court pursuant to s 18(5) of the Specific Relief Act 1950 and that specific performance could be granted subject to conditions without violating any

applicable statutory provisions (see *The Law of Specific Relief by Dr SC Banerjee* (8th Ed) and the Indian case of *Pasumarti Ramulu v Nuthi Anantha Ramulu* AIR 1966 AP 70).

[87] However, it is to be noted that on 19 February 2024, the Federal Court dismissed the plaintiffs' application for leave to appeal against the Court of Appeal decision of 2 October 2023 which set aside the High Court decision of 11 August 2021.

[88] As such, based on the abovementioned facts and in light of the dismissal of the leave application to appeal to the Federal Court which includes the determination of specific performance as well as the alternative award of damages in lieu of specific performance, I am once again constrained to find that the plaintiffs' claim for specific performance and its alternative remedy of damages in lieu of specific performance unsustainable and unmeritorious.

[89] Similarly, I find the contention that the SPAs were capable of specific performance at the discretion of the court pursuant to s 18(5) of the Specific Relief Act 1950 and that specific performance could be granted subject to conditions without violating any applicable statutory provisions is bereft of merits in light of the decision of the appellate courts above.

ISSUE NO 2: IS THE PLAINTIFF ENTITLED TO A DECLARATION THAT THEY ARE ENTITLED TO LAD?

[90] There is no disputing that pursuant to the SPAs, the plaintiff would be entitled to make a claim for LAD pursuant to cl 22 of the SPAs which reads as follows:

> 22(1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated in clause 23 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. *Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.*
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause *shall accrue on the date the Purchaser takes vacant possession of the said Building.*

[91] As such, based on the express words in cl 22(3) of the SPAs, it is clear

that the plaintiffs' entitlement to liquidated damages does not accrue until the date of the delivery of vacant possession of the said properties which has yet to be given in this present case. In this regard and in any event, the defendant pleads and submits that the plaintiffs' claim for LAD is premature and only accrues once vacant possession is given. I agree.

[92] As highlighted earlier, stages 3 and 4 of the mitigation works are underway and the plaintiffs may thereafter proceed to commence any proceedings for LAD once vacant possession is given pursuant to cl 22 of the SPA above.

[93] In my view, being bound by the recent Court of Appeal decision in Suit No 161 and having concluded that the plaintiffs' claim for specific performance and damages in lieu therefore ought to be dismissed, I see no necessity to make any declaration relating to LAD as sought especially since such claim was withdrawn.

[94] In a similar vein, I see no necessity to make any ruling on whether the landslide amounts to force majeure etc. as that issue would be one that the defendant may at the appropriate time subsequently ventilate and rely on to defend any future possible claims for LAD by the plaintiffs.

[95] In any event, whether the defendant is in the midst of applying CCC or not makes no difference in the present case as that ought to be ventilated in any claim for LAD.

CONCLUSION

[96] In the upshot, I would dismiss the plaintiffs' claim in both Suit Nos 8 and 9.

[97] As for costs, in light of the peculiar facts of this case and bearing in mind that the plaintiffs have done nothing wrong and have had to endure such a long wait for their properties through no fault of theirs and also bearing in mind that these suits were commenced on the strength of the pronouncements of George Varughese JC in *Albert Lim*'s case, I find that total costs of RM10,000 would a fair and reasonable sum to award to the defendant in Suit Nos 8 and 9.

Plaintiffs' claim dismissed.

Reported by Nabilah Syahida Abdullah Salleh